

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24**

MVM, INC.

Employer

and

UNITED STATES COURT SECURITY
OFFICERS

Case 24-RC-8529

Petitioner

and

UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL 72

Incumbent Union¹

DECISION AND DIRECTION OF ELECTION

The Employer, MVM, Inc. has a contract with the U.S. Marshals Service to provide security services at Federal courthouse buildings in Puerto Rico. The Petitioner, United States Court Security Officers, filed a petition with the National Labor Relations Board (the Board) under Section 9(c) of the National Labor Relations Act (the Act) to represent a unit comprised of all full-time and regular part-time court security officers (CSOs) and lead court security officers (Leads) employed by the Employer under contract with the U.S. Marshals Service in Puerto Rico; excluding all office clerical employees, professional employees, confidential employees and supervisors as defined in the Act. The petitioned-for unit is comprised of about 52 individuals working at two Federal courthouse facilities in San Juan, Puerto Rico: one in the downtown business district of Hato Rey and the other at the courthouse in Old San Juan.

The Employer contends that the six Leads are supervisors under Section 2(11) of the Act and should be excluded from the unit. The Petitioner takes a contrary view. Three of the Leads work at the Hato Rey courthouse and three work at the Old San Juan courthouse.

Based on the independent authority of the Leads to direct and regularly schedule the post and shift assignments for the CSOs, I find that that the Leads are statutory supervisors and they are properly excluded from the unit.

¹ Although the Incumbent Union was served with a notice of the hearing in this case, no representative of that Union made a formal appearance at the hearing.

I. FACTS

Pursuant to its contract with the U.S. Marshals Service, the Employer provides CSOs who are assigned to various security positions at the Federal courthouses at Hato Rey and Old San Juan twenty-four hours a day, seven days a week. The contract also provides that the Employer must provide a Lead on each weekday shift. Twenty-five CSOs and three Leads work at the Hato Rey facility and 21 CSOs and three Leads work at the Old San Juan facility. The U.S. Marshals Service provides a Contracting Officer Technical Representative (COTR), who serves as the liaison between the U.S. Marshals Service and the Employer for contract purposes. The U.S. Marshals Service determines the post locations for each site, the number of CSOs who must be assigned to each post, and the hours for each post. In addition, the U.S. Marshals Service issues post orders which detail the policies and procedures to be followed at each post.

Past Bargaining History. The Employer and United Government Security Officers of America, Local 72 (the Incumbent Union), are parties to a collective-bargaining agreement (the Agreement) effective from June 13, 2003, through and including September 30, 2006. The Agreement covers the following unit:

All full-time and regular part-time court security officers assigned to the federal courthouses or other judicial facilities within the jurisdictional boundaries of the United States District Court for the District of Puerto Rico employed by the Employer pursuant to its contract(s) with the Federal Government ("Government") for the provision of security at said courthouses, but excluding all managers, supervisors, office and/or clerical employees, temporarily assigned employees, substitute employees, **lead court security officers**, and all other non-court Security Officer employees of the Employer. (Emphasis added)

The Agreement's unit description shows that the Leads are currently excluded from the bargaining unit, but the record indicates that they were specifically covered under a prior collective-bargaining agreement between the Incumbent Union and the Employer from about 1998 until 2003.

The Employer's Operation. The Employer's highest ranking official in Puerto Rico is its Site Supervisor, Louis Comas, who has an office at the Hato Rey facility. Comas is responsible for overseeing the Employer's operations in Puerto Rico and ensuring that the Employer's contract with the U.S. Marshals Service at both the Hato Rey and Old San Juan courthouses is properly carried out. Reporting directly to Comas are the six Leads. Each daytime Lead oversees up to approximately 20 CSOs, while Leads in charge of other shifts oversee fewer CSOs. The CSOs report directly to the Lead. The CSOs provide security services under the procedures specified in the U.S. Marshals Service contract by manning and enforcing security at their assigned posts. The posts include visitor checkpoints, control rooms containing communications and security surveillance equipment, courtrooms, and loading docks. For example, at the visitor checkpoints, CSOs use X-ray and metal detector machines to screen visitors. CSOs also patrol the premises at the courthouses.

The Leads. As indicated above, the U.S. Marshals Service contract requires the Employer to provide at least one Lead on each weekday shift and the Leads report to Comas. The Lead oversees the CSOs on his shift, coordinates security services directly with the COTR and the clients at the courthouse, and coordinates and implements the policies of the COTR and the Employer. The Leads do not have regular post assignments as do the CSOs. The

parties stipulated, and I find, that the Leads have no authority to hire, lay off, recall or promote employees. The record also shows that the Leads do not formally evaluate the CSOs and have no authority to permanently transfer CSOs from one facility to another or to make permanent shift assignments for CSOs. Such functions are carried out by Site Supervisor Comas.

At the Hato Rey courthouse, the Leads share an office with Comas, and at the Old San Juan courthouse, the Leads share an office provided by the U.S. Marshals Service. The CSOs do not use these offices. At the Hato Rey courthouse, Lead Carlos Borges opens the office at about 5:30 a.m. on weekdays and Comas arrives at work between 7:00 a.m. and 7:30 a.m.. After Borges opens the office, he checks with the control room to see if anyone has called in sick for whom he must find a replacement. Borges then gets his weapon and baton and returns to the office to prepare the daily work schedule. He checks in the CSOs as they arrive for work on staggered schedules, notifies them of any changes in their post assignments, and gives them their daily work instructions. Borges then walks from post to post, inspecting to ensure that the contract is being carried out and giving the CSOs their timesheets. The Leads are responsible for handling time and attendance matters and for filling out information pertaining to absences and replacements on the daily schedule and on absentee forms. The record reflects that the Leads have a list of CSOs to use to locate replacements, but they are not required to choose from the list in any prescribed manner. If they cannot find a replacement, the Leads substitute for the absent CSO until a replacement can be found. Lead Roberto Santiago testified that he fills in for absent CSOs about once a month for an hour or two until he can find a CSO to cover the post.

After completing their inspection rounds, Leads return to the office to fill out paperwork, which includes daily schedules, biweekly schedules, absentee forms, etc. At the Hato Rey courthouse, the next Lead who arrives to work after Borges, arrives at about 1:30 p.m. There is one Lead on each weekday shift, at each courthouse.

As indicated above, Leads fill out the biweekly and daily schedules for the CSOs on their shifts. Each day, they assign the CSOs to their posts. Leads have authority to independently make post assignments for the CSOs based on their assessment of the needs under the contract with the U.S. Marshals Service, the experience and abilities of the CSOs, and the requests of the CSOs for specific post assignments. Leads are not required to consult with Comas or any other higher official in performing this function. Lead Borges testified that while some CSOs have regular post assignments, he assigns most of the CSOs on his shift to work at different posts every week. He gave several examples of his assignment of CSOs to specific posts based on his assessment of their experience levels. He further testified regarding occasions when he has made post assignments at the request of CSOs. In addition, he testified that if circumstances, such as morning traffic congestion, cause some CSOs to be late to work, he transfers other CSOs to cover their posts as necessary to fulfill the contract with the U.S. Marshals Service. According to Borges, once he assigns a CSO to a post, the CSO must remain at that post until given a different post assignment; the CSO could be subject to progressive discipline for failing to do so. Post assignments do not affect the CSO's rate of pay.

With regard to overtime, Leads can assign overtime if a judge keeps a courtroom open late, if there is a special event at the courthouse, or if a CSO cannot report for his shift on the weekend. In the case of a special event or where the need for overtime is determined in advance, the Agreement provides that seniority governs the assignment of overtime. In the case of a courtroom staying open late or a CSO who cannot report for a weekend shift, the Lead can assign overtime to the CSO who is already on duty. In those circumstances, the Agreement

provides that due to the shortness of notice to the Employer, the CSO is required to perform the overtime unless he is excused by the Employer for good cause.

Permanent shift assignments for the CSOs are made based on seniority under the terms of the Agreement. According to Borges, however, about twenty of the CSOs rotate shifts on a weekly basis. In addition, Borges regularly makes temporary shift transfers; Borges testified that he does this once or twice a week. For example, Borges testified that he transferred CSO Jose Velez from his night shift to the day shift for two nights because a part-time CSO, who was also a police officer, had requested to work the night shifts. The record contains a letter from Borges to Velez, dated July 5, 2006, documenting this transfer of Velez to the two different shifts. Significantly, the Employer pays a higher night shift differential, which would have affected Velez and the other CSO involved in those shift change assignments. As discussed more fully below, the record also reflects a situation in 2005, when Lead CSO Santiago attempted to resolve a CSO's scheduling problem by changing his days of work. According to Borges, when a Lead changes a CSO's shift, the CSO must report for the assigned shift until given a new shift assignment or he could be subjected to progressive discipline by the Employer. The Leads are not required to consult with Comas prior to making shift assignments and there is no indication in the record that they do so.

Leads can orally warn and document oral warnings given to CSOs by filling out employee counseling forms and incident reports. The record includes four employee counseling forms filled out by leads. Two of these are dated in 2004, signed by Lead Nancy Diaz and Lead Roberto Santiago, respectively, and pertain to the CSOs' failure to sign the daily attendance log. A third employee counseling form is dated July 31, 2005, and is signed by Lead Santiago. It states that CSO Luis Sanchez failed to report to work because he was on vacation and forgot his schedule. The fourth employee counseling form is dated October 3, 2005, and is also signed by Lead Santiago. It states that CSO Ramon Western was not performing at an acceptable level because he failed to report for duty on six occasions between July 8 and September 23, 2005. Santiago testified that after issuing the employee counseling to Western on October 3, he called Site Supervisor Comas and recommended that Western receive a written warning. Comas subsequently issued a written reprimand to Western based on Santiago's recommendation. Comas further testified that in 2003, Lead Ramon Pagan recommended that a CSO be given a written reprimand for absenteeism and Comas had "reviewed the situation and . . . concurred with [Pagan's] recommendation." According to Comas, his review of the situation included reviewing all the reports and "taking everything into consideration," and determining if the conduct in question warranted a written reprimand. Finally, while it does not appear that Comas often issues discipline, he testified that he has never rejected a Lead's recommendation to take disciplinary action.

Article VII, Section 2, of the current collective-bargaining agreement states, in relevant part, that "[i]t is recognized by the parties to this Agreement that progressive discipline generally shall be applied in dealing with employees." In addition, all discipline is subject to the parties' grievance and arbitration procedures.

Under the Agreement's grievance procedure, an employee first presents his dispute, with or without his union representative present, to his immediate supervisor in an attempt to resolve the issue on an information basis. If the matter is not resolved, the employee must file a written grievance and Site Supervisor Comas and/or a higher Employer official then handles any further grievance processing for the Employer. The record contains only one specific example of a Lead handling a potential grievance matter with an employee. As described above, in October 2005, Lead Santiago issued an employee counseling to CSO Western because

Western had an absenteeism problem. In an effort to resolve the problem, Lead Santiago met on two occasions with CSO Western and his union representative. As a result of the meetings, Lead Santiago agreed to change Western's schedule so that he would work on Wednesdays, rather than Fridays, in order to accommodate Western's work schedule with another employer. Santiago then effectuated the change in Western's schedule without first consulting with Site Supervisor Comas. Though the record does not reflect any other specific instances of a Lead adjusting a grievance, Lead Santiago testified that during his three years as a Lead, he has met 20 times or more with CSOs and their Union representative at the informal level of the grievance procedure.

If CSOs encounter problems while working, they contact the Lead on duty for assistance. According to Comas, the Lead handles the problem and then informs Comas of the incident. If the Lead is unable to handle a problem, he contacts the COTR and/or Comas. In this regard, Comas testified about a recent incident in which a car drove through the security gate at 80 mph and the Lead had handled the situation and then notified Comas and the COTR.

Leads serve as direct liaisons with the COTR and the judges at the courthouses and they administer and implement the policies and procedures of the U.S. Marshals Service contract after consulting with the COTR. Lead CSO Borges testified that he recently initiated and implemented a new policy of no longer retaining sharp objects at the check-in points after confiscating them from visitors; instead, the instruments were disposed of or visitors were instructed that they had to leave the courthouse with such objects. After consulting with the COTR about the policy change, he trained the CSOs in the new procedures and informed Site Supervisor Comas after it was implemented. Borges also testified that, on his own initiative, he recommended to the Chief Judge of the First Judicial Circuit of Puerto Rico that the policy of having cellular phones checked with CSOs at the check-in points be changed because it was interfering with the CSOs' ability to provide security services for the courthouse. According to Borges, the Chief Judge thereafter issued an order changing the cellular phone policy and Borges implemented the new policy ordered by the Chief Judge. Comas was not consulted in advance of Borges's actions on this occasion.

The Leads are on call on the weekends. If a CSO calls in sick on the weekend, the control room contacts the Lead and the Lead must find a replacement for the CSO. During the week, when Leads are absent, the Employer assigns a CSO as an acting Lead and pays him at the Lead wage rate.

The Leads meet with Comas on a weekly basis and Comas informs them of any new policies or forms that must be used. When a new Lead begins his shift, he is briefed regarding the status of the operations by the Lead whose shift is ending.

CSOs are paid between \$12 and \$14 an hour, plus night shift differentials when applicable. According to the Agreement, the night shift differential is 106% of a CSO's usual hourly rate. Leads earn about \$3 more an hour than the CSOs, but otherwise both Leads and CSOs receive the same benefits. Leads and CSOs use the same locker room, which is provided by the U.S. Marshals Service. CSOs and Leads wear the same type of uniforms except that the Leads wear a badge identifying them as a Lead.

II. ANALYSIS

As indicated above, the Petitioner seeks to include the Leads in the unit and the Employer contends that the Leads are statutory supervisors who should be excluded from the unit. For the reasons set forth below, I find that the Leads are statutory supervisors.

The term “supervisor” is defined in Section 2(11) of the Act as:

[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is read in the disjunctive and the possession of any one of the types of authority listed is sufficient to establish supervisory status under the Act. *Mississippi Power Company*, 328 NLRB 965, 969 (1999), citing *Ohio Power v. NLRB*, 176 F.2d 385, 387 (6th Cir 1949), cert. denied 338 U.S. 899 (1949). Applying Section 2(11) to the duties and responsibilities of any given individual requires a determination of whether the person possessing such authority uses independent judgment in conjunction with such authority, and does so in the interest of management and not in a routine manner. See *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). Thus, if the exercise of Section 2(11) authority is done in merely a routine, clerical or perfunctory manner, it does not confer supervisory status. See *Chicago Metallic Corp.*, 273 NLRB 1677 (1985). The Act requires “evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority.” *Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971). Employees who are merely conduits for relaying information between management and employees are not statutory supervisors. See *Bowne of Houston*, 280 NLRB 1222, 1224 (1986). Finally, the burden of proving supervisory status is on the party who asserts that it exists. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *California Beverage Co.*, 283 NLRB 328 (1987); *Tucson Gas & Electric Company*, 241 NLRB 181 (1979).

In the instant case, the record shows that the Leads direct the CSOs in their daily work and are authorized to make post and shift assignments for the CSOs on a regular basis. The record further establishes that the Leads utilize independent judgment in making such post and shift assignments based on their assessment of the need for coverage under the U.S. Marshals Service contract, on how best to accommodate the needs and requests of the CSOs, and on how best to utilize the experience and abilities of the CSOs. Given the discretion involved in balancing these different considerations, I find that the exercise of such authority by the Leads is not routine in nature. The record provides several examples of Leads regularly making post and shift assignments using independent judgment and without consulting Comas. Further, the authority to make shift assignments is particularly significant since such assignments not only affect when and where a CSO works and what he is doing, but can also affect how much he is paid, given the night shift differential paid by the Employer.

Finally, I note that Site Supervisor Comas works from the Hato Rey courthouse and works during the day. At all other times at the Hato Rey courthouse, and at all times at the Old

San Juan courthouse, the Lead is the Employer's highest authority working at the site. *Pennsylvania Truck Lines*, 199 NLRB 641, 642 (1972).

Based on the foregoing evidence, I find that the Leads' authority to direct the work of the CSOs, and to make post and shift assignments on a regular basis, using independent judgment, is sufficient to establish that they possess primary indicia of supervisory status and that they are supervisors under Section 2(11) of the Act. Thus, I find that they are properly excluded from the unit. See *Greenbrier Hotel*, 216 NLRB 721, 723 (1975); *Custom Bronze & Aluminum*, 197 NLRB 397, 398 (1972)²

While I have not found that the Leads possess any of the other primary indicia of supervisory status set forth in Section 2(11) of the Act,³ my finding that they are statutory supervisors is strongly supported by evidence of secondary indicia: Leads do not regularly perform CSO type work; they utilize an office, unlike CSOs; they are paid at a significantly higher wage rate than CSOs; they are the direct liaisons between the Employer and the COTR; they wear a badge that identifies them as a Lead; they regularly attend supervisory meetings with Comas; and, since about 2003, the Leads have been excluded from the CSO bargaining unit. Lastly, I note that if the Leads are not statutory supervisors, then the supervisor to employee ratio would be approximately one to fifty-two. If however, like the Site Supervisor, the Leads are supervisors, the ratio is approximately one to six. See *Pennsylvania Truck Lines*, 199 NLRB 641, 642 (1972).

In conclusion, based on my review of the entire record and the arguments of the parties made at the hearing, and for the reasons stated above, I find that the Leads are statutory supervisors and they are excluded from the unit.

² I have reviewed the Decision and Direction of Election in two cases referred to in the record, *MVM, Inc.*, 2-RC-21980 and 21981 (August 28, 1998), in which the Director concluded that the Leads in that case were not supervisors and another Decision and Direction of Election in *MVM, Inc.*, 5-RC-15873 (July 1, 2005), in which the Leads were found to be statutory supervisors. I do not find either of these cases to be dispositive of the instant case since each case must be reviewed based on the specific facts adduced on the record, and even cases involving the same employer at different locations can produce different results depending on the facts presented.

³ The parties stipulated that Leads have no authority to hire, lay off, recall or promote employees. The record evidence is insufficient to establish that Leads possess authority to discipline or to effectively recommend the discipline of CSOs. The record only reflects two disciplinary actions beyond an oral counseling; and, in one of those actions, Site Supervisor Comas conducted an independent review and made the final decision as to whether or not discipline would be given. The record also only reflects four occasions during a two-year period when a Lead documented an oral counseling. Finally, it appears that the Employer does not adhere strictly to a progressive disciplinary system, wherein a certain number of oral counselings would automatically lead to further disciplinary action. See *Ken-Crest Services*, 335 NLRB 777, 778 (2001). I also find that the record does not establish that Leads possess authority to adjust grievances. Rather, the collective-bargaining agreement encourages employees to work out issues directly with their immediate supervisor prior to filing a written grievance and once a written grievance is filed, it is handled by the Site Supervisor or a higher management official. The record only reflects one specific instance where a Lead met with an employee and his union representative to remedy a potential grievance. Based on these facts, the Employer has not met its burden to show that the Leads adjust grievances within the meaning of Section 2(11) of the Act. *Ken-Crest Services*, 335 NLRB at 779.

III. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. As indicated above, the only issue presented in this case is the supervisory status of the Leads. The record shows that the CSOs covered under the prior contract with the Incumbent Union share a substantial community of interest, since they all perform the same type of work for the Employer out of the same locations, and they have the same wage rates and other terms and conditions of employment under the Agreement between the Employer and the Incumbent Union. Accordingly, I find that the following unit, which is the unit covered by the Agreement, is an appropriate unit for collective bargaining purposes:

All full-time and regular part-time court security officers assigned to the Federal courthouses or other judicial facilities within the jurisdictional boundaries of the United States District Court for the District of Puerto Rico employed by the Employer pursuant to its contract(s) with the Federal Government ("Government") for the provision of security at said courthouses, but excluding all managers, supervisors, office and/or clerical employees, temporarily assigned employees, substitute employees, lead court security officers, and all other non-court security officer employees of the Employer.

DIRECTION OF ELECTION⁴

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the

⁴ The Incumbent Union must notify the Region within seven (7) days of the issuance of this decision if it does not desire to be included on the ballot or it will be included.

polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **UNITED STATES COURT SECURITY OFFICERS** or by **UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA, LOCAL 72**, or by neither labor organization.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB. Wyman-Gordan Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, La Torre de Plaza – Suite 1002, 525 F.D. Roosevelt Avenue, San Juan, Puerto Rico 00918-1002, on or before **August 28, 2006**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001. This request must be received by the Board in Washington **by September 5, 2006**.⁵

Dated at San Juan, Puerto Rico, and this 21st day of August, 2006.

/s/

Efrain Rivera-Vega, Acting Regional Director
National Labor Relations Board
Region 24
La Torre de Plaza – Suite 1002
525 F.D. Roosevelt Avenue
San Juan, Puerto Rico 00918-1002

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⁵ In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.